

FINAL ORDER

DATE 12/23/2009

IN THE MATTER OF

REBECCA A. SMALL

Applicant

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BEFORE THE

COMMISSIONER OF

FINANCIAL REGULATION

OAH NO.: DLR-CFR-76B-09-14332

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PROPOSED ORDER

The Proposed Decision of the Administrative Law Judge in the captioned case having been considered in its entirety, it is **ORDERED** by the Commissioner of Financial Regulation (the "Commissioner") this 30th day of November, 2009 that the Proposed Decision shall be and hereby is adopted as a Proposed Order.

Pursuant to COMAR 09.01.03.09, Applicant has the right to file exceptions to the Proposed Order and present arguments to the Commissioner. Applicant has twenty (20) days from the postmark date of this Proposed Order to file exceptions with the Commissioner. COMAR 09.01.03.09A(1). The date of filing exceptions with the Commissioner is the date of personal delivery to the Commissioner or the postmark date on mailed exceptions. COMAR 09.01.03.09A(2).

Unless written exceptions are filed within the twenty (20)-day deadline noted above, this Order shall be deemed to be the final decision of the Commissioner.



Sarah Bloom Raskin

Commissioner of Financial Regulation

REBECCA A. SMALL,

APPLICANT

v.

COMMISSIONER OF FINANCIAL

REGULATION

* BEFORE J. BERNARD MCCLELLAN,

* AN ADMINISTRATIVE LAW JUDGE

* OF THE MARYLAND OFFICE OF

* ADMINISTRATIVE HEARINGS

* OAH CASE NO: DLR-CFR-76B-09-14332

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PROPOSED DECISION

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STATEMENT OF THE CASE

On March 31, 2009, the Maryland Commissioner of Financial Regulation (CFR), Department of Labor, Licensing and Regulation (Department), denied the Applicant's application for a mortgage originator's license. On or about April 2, 2009, the Applicant filed an appeal, after which the CFR referred the matter to the Office of Administrative Hearings (OAH) for a hearing. The CFR delegated to the OAH the authority to issue proposed findings of fact and conclusions of law, and a recommended order.

I held a hearing on June 25, 2009, at the OAH in Hunt Valley, Maryland. Assistant Attorney General Tom Lawrie represented the CFR. The Applicant represented herself. I heard this case pursuant to Section 11-616 of the Financial Institutions Article, Annotated Code of Maryland (Supp. 2008). Procedure in this case is governed by the Administrative Procedure Act, Md. Code Ann., State Gov't. §§ 10-201 through 10-226 (2004 & Supp. 2008), OAH's Rules of

Procedure, Code of Maryland Regulations (COMAR) 28.02.01, and the Rules of Procedure of the Department, COMAR 09.01.03.

ISSUE

Did the Department properly deny the Applicant's application for a mortgage originator's license?

SUMMARY OF THE EVIDENCE

Exhibits

The CFR submitted the following documents, which I admitted into evidence:

- CFR #1 Notice of Hearing, dated May 15, 2009
- CFR #2 Letter from CFR to Applicant, dated March 31, 2009
- CFR #3 Letter from Applicant to CFR, dated April 2, 2009
- CFR #4 Letter from CFR to OAH, dated April 15, 2009
- CFR #5 Printout of Case Information, Circuit Court for Harford County
- CFR #6 Letter from Applicant To Whom It May Concern, dated February 6, 2009
- CFR #7 Photocopy of *Bernard v. State*, a Court of Special Appeals of Maryland case
- CFR #8 CFR Licensing File Printouts
- CFR #9 COMAR 09.01.02.16 and Statutes
- CFR #10 Senate Bill 269

The Applicant did not offer any exhibits for admission into evidence.

Testimony

The Applicant testified on her own behalf and offered the testimony of Patrick Shawn Craig, Licensed Mortgage Broker.

CFR presented the testimony of Calvin Wink, Jr., CFR Supervising Investigator.

FINDINGS OF FACT

I find the following facts by a preponderance of the evidence:

1. On or about January 21, 2009, the Applicant filed an application for a mortgage originator's license with the CFR. As part of the application process, the Applicant disclosed her criminal history.

2. The Applicant's criminal history consisted of a conviction on January 11, 2007, in the Circuit Court for Harford County, pursuant to an *Alford* plea of guilty to Theft-Scheme of \$500 Plus.

3. During the events that lead to her conviction, the Applicant worked as an assistant manager of a small children's boutique store. The owner of the store alleged that the Applicant stole money that had been noted in the deposit book but had not been deposited in the store's bank account. The Applicant was then charged with theft and theft scheme.

4. Under the advice of her attorney, the Applicant entered an *Alford* plea, which she understood as asserting her innocence, but admitting that she may be found guilty if she continued with a trial in front of a judge or jury. As a result, on January 11, 2007, the Applicant was convicted of Theft-Scheme of \$500 Plus.

5. The Court imposed payment of restitution and an eighteen-month unsupervised probationary period, apparently indicating that upon successful completion of the unsupervised probationary period, the Applicant could seek to have the conviction expunged.

6. The Applicant's probationary period has expired but she never sought to have the record of conviction expunged.

DISCUSSION

Concerning the issuance of a mortgage originator's license, Maryland law

specifies that:

(a) The Commissioner may not issue a mortgage loan originator license unless the Commissioner makes, at a minimum, the following findings:

(1) The applicant has never had a mortgage loan originator license revoked in any governmental jurisdiction;

(2) The applicant has not been convicted of, or pled guilty or nolo contendere to, a felony in a domestic, foreign, or military court:

(i) During the 7-year period immediately preceding the date of the application for licensing; or

(ii) At any time preceding the date of application, if the felony involved an act of fraud, dishonesty, a breach of trust, or money laundering;

(3) The applicant has demonstrated financial responsibility, character, and general fitness sufficient to command the confidence of the community and to warrant a determination that the mortgage loan originator will operate honestly, fairly, and efficiently;

(4) The applicant has completed the prelicensing education requirement under §11-606 of this subtitle and any prelicensing education requirements established by the Commissioner by regulation;

(5) The applicant has passed a test that meets the requirements established under §11-606.1 of this subtitle and any prelicensing testing requirements established by the Commissioner by regulation; and

(6) The applicant has met the surety bond requirement under §11-619 of this subtitle.

Md. Code Ann., Fin. Inst. § 11-605(a) (Westlaw 2009).¹

CFR denied the Applicant's application because she was convicted of theft by scheme of \$500 or more, a felony. CFR argued that it must make certain determinations before issuing a license, including that the Applicant has never pled guilty to a felony. It argued that the Applicant's *Alford* plea is effectively the same as any other guilty plea. It further contended that the law prevents it from granting a license where the applicant has plead guilty to a felony

¹ This current version of § 11-605 was passed on July 1, 2009, after the Applicant applied for her license. It applies in her case because the CFR's denial of the license is not final until this decision is issued. However, my recommended order would be the same under the prior law.

involving fraud or dishonesty and it therefore had no choice but to deny the Applicant's application.

The Applicant does not dispute that her record contains a felony conviction. However, she argues that she did not commit the crime for which she received the conviction and that she entered the *Alford* plea because of poor advice from her public defender and in order to avoid jail time. She noted that she was not fully aware of the consequences of entering the Alford plea and that she was honest about the conviction in her application for a mortgage originator's license. She explained that she did not try to have the conviction expunged because she was busy with her children. She also explained that she knows how to work in the mortgage industry and could make more money if she were allowed to originate. She argued that she is of good moral character and believes she is qualified for a license.

The Applicant presented testimony from her current supervisor, Patrick Shawn Craig, licensed mortgage broker and owner of a mortgage company where the Applicant is currently employed. Mr. Craig testified that the mortgage industry is being attacked, and while he agrees that lenders must be responsible, he feels that today's environment is tough on mortgage brokers. He testified that, having seen the Applicant work, she is one of the best employees he has had and that her work has been perfect. He believes she is of good moral character and is proud to have her as an employee. He feels that if given the opportunity, the Applicant will make the State proud.

Even though the Applicant may be a competent and trust worthy employee in her current position in the mortgage industry, Maryland law requires that the CFR deny a mortgage originator's license to any applicant with a felony conviction. Md. Code Ann., Fin. Inst. § 11-605(a). The law provides that the "Commissioner *may not* issue a mortgage loan originator

license” if the applicant has been “convicted of, or pled guilty or nolo contendere to, a felony in a domestic, foreign, or military court (i) [d]uring the 7-year period immediately preceding the date of the application for licensing; or (ii) [a]t any time preceding the date of application, if the felony involved an act of fraud, dishonesty, a breach of trust, or money laundering.” *Id.* (emphasis added). An *Alford* plea is effectively no different from any other guilty plea. *Ward v. Maryland*, 83 Md. App. 474, 771-773 (1989).² The Applicant’s conviction occurred within 7 years immediately preceding the date of the application for licensing. The position of assistant manager of a store is one of trust similar to a position of mortgage originator. The crime of theft is a breach of that trust. Thus, her conviction was also for a felony involving an act of fraud, dishonesty, a breach of trust, or money laundering. Therefore, the Applicant’s *Alford* plea for the felony of theft by scheme falls within the statute’s prohibition. Md. Code Ann., Fin. Inst. § 11-605(a).

Even if the Applicant did not commit the crime, as she asserted she did not, the law requires that her license be denied because of the conviction on her record. I cannot determine whether or not she was rightfully convicted, but can only determine whether the CFR’s denial of her application was proper. The law does not provide for any discretion by CFR where the applicant has pled guilty or been convicted of a felony. Accordingly, I have no choice but to find that the CFR properly denied the Applicant’s application for a mortgage originator’s license.

CONCLUSIONS OF LAW

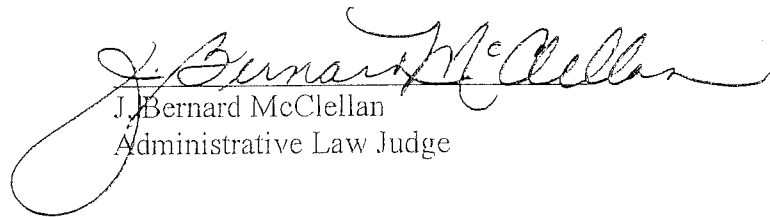
I conclude as a matter of law that the CFR properly denied the Applicant’s application for a mortgage originator’s license. Md. Code Ann., Fin. Inst. § 11-605(a).

² *Ward* held that no direct appeal lies from an *Alford* plea, which is “a specialized type of guilty plea where the defendant, although pleading guilty, continues to deny his or her guilt, but enters the plea to avoid the threat of greater punishment,” reasoning that an *Alford* plea cannot be “construed as anything short of a guilty plea.” 83 Md. App. 474, 771-773 (1989). The court noted in its decision that an *Alford* plea is voluntary and there must be a factual basis for the plea. *Id.* at 773.

RECOMMENDED ORDER

I **RECOMMEND** that the Maryland Commissioner of Financial Regulation deny the Applicant's application for a mortgage originator's license.

September 23, 2009
Date Decision Mailed


J. Bernard McClellan
Administrative Law Judge

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